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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 393

HARRY J. WISNER,

Appellant,

vs.

KATHLEENE KAMINSKI, A.K.A. CATHERINE MILLER WISNER KAMINSKI

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

HENDERSON H. CARSON,
Counsel for Appellee.

HART AND HART,
Of Counsel.

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Now comes Kathleene Kaminski, applicant-appellee herein, and moves the Court for an order dismissing the appeal attempted by appellant in this cause, and, in the alternative, moves the Court for an order affirming the judgment of the Supreme Court of Ohio in this cause, from which judgment appellant is attempting to appeal.

Applicant-appellee furnishes herewith, her statement disclosing matters and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant.

HART & HART,
IAN BRUCE HART,
Of Counsel for Applicant-Appellee.

Statement of Grounds Against Jurisdiction

Anna Miller, mother of Kathleene Kaminski was appointed guardian of the person and estate of her daughter on May 12, 1923, by the Probate Court of Columbiana County, Ohio. Thereafter the guardian married Harry J. Wisner, appellant herein. During the minority of her ward the guardian filed five interim accounts and upon the ward reaching her majority a sixth and final account was filed. All of these accounts were attacked by exceptions filed by the ward, which exceptions remain unheard and undisposed of in the Probate Court of Columbiana County, Ohio. While such exceptions were perding the guardian died. The former ward filed her application under favor of Section 10506-55 of the General Code of Ohio for the appointment of a successor fiduciary so that her exceptions could be finally heard and determined.

Section 10506-55 of the General Code of Ohio reads as follows:

> VACANCY BEFORE TERMINATION OF THE TRUST; ACCOUNTING; SUCCESSOR FIDUCIARY
>
> "If a sole fiduciary dies, is dissolved, declines to accept, resigns, is removed, or becomes incapacitated or otherwise unable to act, prior to the termination of the trust, the probate court shall require a final account of all dealings of such trust to be filed forthwith by such fiduciary if a living person and able to act; or if such fiduciary be a living person but unable to act, by his guardian, if any, or if there be no guardian, by some other suitable person in his behalf, appointed or approved by the court; or if such fiduciary be a deceased person, by his executor or administrator; or if such fiduciary be a dissolved corporation, by such person or persons as may be charged by law with winding up the affairs of such corporation. Thereupon the probate court shall cause such proceedings to be had as are

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provided by law as to other accounts filed by fiduciaries.

Whenever such a vacancy occurs and such contingency is not otherwise provided for by law, or by the instrument creating the trust, or whenever such instrument names no fiduciary whatever, the court shall, either on its own motion or on the application of any person beneficially interested, appoint and issue letters of appointment as fiduciary to some competent person or persons who shall qualify according to law and execute the trust to its proper termination. Such vacancy, and the appointment of a successor fiduciary shall not affect the liability of the former fiduciary, or his sureties, previously incurred."

The various phases of this case have been in litigation for approximately five years, due mainly to the technical questions raised by counsel for the present appellant. The only portion of this extended litigation which is germane to the present discussion relates to the decision of the Court of Appeals of Columbiana County, Ohio, which court, early in the year 1948 ordered the Probate Court of Columbiana County to appoint a successor fiduciary under Section 10506-55 of the General Code of Ohio and proceed with a hearing and determination of the exceptions to the accounts of the former guardian. The Supreme Court of Ohio refused to certify the record for final review and likewise denied an appeal as of right, on the ground that no debatable constitutional question was involved in the case. See *In re Guardianship of Wisner*, 149 O. S. 488.

The appellant, Harry J. Wisner, became a party to this litigation on his own motion in the Court of Appeals of Columbiana County, Ohio. At no time in any court did the appellant ever advance the claim that Section 10506-55 of the General Code of Ohio was repugnant to the constitution of the United States. The appellant does not make that claim at the present time. If we read his jurisdictional state-

ment in support of the petition for appeal correctly, it would seem that appellant complains chiefly of the fact that the courts are following the provisions of Section 10506-55 of the law of Ohio and that in so doing they are depriving appellant of due process of law. This we submit does not present the type of federal question which must be found to give the Supreme Court of the United States jurisdiction over a cause on appeal under Section 237 of the Judicial Code, 28 U. S. C. Sec. 344 a; 28 U. S. C. A. Sec. 344 a.

It is axiomatic that three things must concur to give the Supreme Court of the United States jurisdiction: 1. The validity of a statute of a state must be drawn in question. 2. It must be drawn in question upon the ground that it is repugnant to the constitution, treaties or laws of the United States. 3. The decision of the state court must be in favor of the validity of the state statute. *Commonwealth Bank* v. *Griffith*, 14 Pet. (39 U. S.) 56; 10 L. Ed. 352.

It is likewise fundamental, and essential to the jurisdiction of the United States Supreme Court on appeal under Section 237 of the Judicial Code, that there be an explicit and timely insistence in the state courts that a state statute is repugnant to the federal constitution. *State Farm Mutual Automobile Insurance Company* v. *Duel*, 324 U. S. 154, 89 L. Ed. 812; *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182, 89 L. Ed. 857; *Congress of Industrial Organizations* v. *McAdory*, 325 U. S. 472, 89 L. Ed. 1741. This was never done in the present case.

It has been held recently that questions first presented to the highest state court on a petition for rehearing come too late for consideration in the United States Supreme Court, unless the state court exerts its jurisdiction in such a way that the case could have been brought to the Supreme Court had the questions been raised prior to the original disposi-

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tion. *Radio Station WOW, Inc.* v. *Johnson* 326 U. S. 120; 89 L. Ed. 2092.

The highest court in the State of Ohio has decided that there was no debatable constitutional question involved in appellant's attempted appeal to that court. That judgment is entitled to respect, and should not be reversed unless it clearly appears that the court was in error.

We contend that the rulings of the Supreme Court of Ohio were not of a nature to bring this case within the statutory provisions of the Judicial Code of the United States so as to confer jurisdiction on the Supreme Court of the United States. It is obvious that the claimed constitutional questions urged by appellant are not substantial. The appellant had his day in court on his own motion and will still have ample opportunity to make any appearance he may see fit when the exceptions to the guardian's account are assigned for hearing and determined. This case presents a situation wherein a simple proceeding to hear and determine exceptions to a state court guardian's accounts has been complicated and delayed by the technical maneuvering of appellant's counsel.

We, therefore, contend that the Supreme Court of the United States is without jurisdiction to hear this case on appeal and that appellee's motion to dismiss, or, in the alternative, to affirm, should be sustained.

Respectfully submitted,

HENDERSON H. CARSON,
Counsel for Appellee.

HART AND HART,
Of Counsel.